Supreme Court, U.S.
FILED
JUL 11 2003
OFFICE OF THE CLERK

(2)

No. 02-1638

IN THE

# Supreme Court of the United States

PEGGY A. GALLO-LOEKS,

*Petitioner,*

*v.*

QWEST CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION

ROBERT L. JOGA
SENIOR ATTORNEY
LABOR AND EMPLOYMENT LITIGATION
QWEST CORPORATION
1801 California Street
38th Floor
Denver, CO 80202

J. MARK BAIRD
*Counsel of Record*
BETH A. DOHERTY QUINN
BAIRD LAW FIRM, LLC
2036 E. 17th Avenue
Denver, CO 80206
(303) 813-4500

*Attorneys for Respondent*

181769

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

28 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Did the standards for determining whether a plaintiff has established a *prima facie* case of reverse discrimination set forth in *Notari v. Denver Water Dep't*, 971 F.2d 585 (10th Cir. 1992), and applied to Petitioner below, allow Petitioner the opportunity to present facts sufficient to establish an inference of discrimination, as required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)?

2. Did the standards applied to Petitioner below for determining whether she established her *prima facie* case, taken together, materially differ from the standard, which Petitioner seeks to have applied to her now, utilized in the Tenth Circuit for a disparate discipline claim by a minority plaintiff?

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent respectfully submits this Corporate Disclosure Statement:

Qwest Corporation, f/k/a U S WEST Communications, Inc., the Respondent in this case, is a wholly owned subsidiary of Qwest Services Corporation. Qwest Services Corporation is a wholly owned subsidiary of Qwest Communications International, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented for Review | i |
| Corporate Disclosure Statement | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Statement of the Case | 1 |
| Reasons for Denying the Petition | 4 |
| I. The Decision Below Is Not In Conflict With Any Decision Of This Court. | 4 |
| A. The *Prima Facie* Case Requirements Applied To Petitioner In The Decision Below Are Consistent With *McDonnell* Douglas. | 5 |
| 1. The *McDonnell Douglas Prima Facie* Case Is Simply A Requirement That The Plaintiff Present Evidence Sufficient To Create An Inference of Discrimination. | 5 |
| 2. The Tenth Circuit Standard For Establishing A *Prima Facie* Case Of Reverse Discrimination Upholds This Long-Standing *McDonnell Douglas* Requirement. | 9 |

*Contents*

*Page*

B. There Is No Difference Within The Tenth Circuit Between The *Prima Facie* Case Requirements Applied To Petitioner Below And The Prima Facie Requirements For A Minority Plaintiff To Establish The Same Case Of Disparate Discipline. ..... 12

II. The Question Presented Has No Bearing On The Outcome Of This Case. ..... 15

III. There Is No Circuit Split Regarding The Burden Of Proof Required To Establish A Prima Facie Case Of Reverse Discrimination And The Split Regarding The Precise Pattern Of Proof Required Is Not A Compelling Reason To Grant Certiorari Here. ..... 17

Conclusion ..... 21

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Archuletta v. Colorado Dep't of Prob.*, 46 F. Supp. 2d 1100 (D. Colo. 1998) ..... 12, 19

*Bass v. Bd. of County Comm'rs*, 256 F.3d 1095 (11th Cir. 2001) ..... 18

*Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978) ..... 5, 6, 7, 11

*Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993) .. 18, 19, 20

*Hysten v. Burlington N. and Santa Fe Ry. Co.*, 296 F.3d 1177 (10th Cir. 2002) ..... 13

*Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999) ... ..... 6, 11, 18, 19

*Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) ..... 6, 7

*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) ..... 4, 12, 14

*McDonnell Douglas v. Green*, 411 U.S. 792 (1973) ..... *passim*

*Mills v. Health Care Servs. Corp.*, 171 F.3d 450 (7th Cir. 1999) ..... 19

*Cited Authorities*

*Page*

*Notari v. Denver Water Dep't*, 971 F.2d 585 (10th Cir. 1992) ..... *passim*

*O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996) ..... 8, 11, 12, 20

*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ..... 7

*Taken v. Oklahoma Corp. Comm'n*, 934 F. Supp. 1294 (W.D. Okla. 1996), *aff'd*, 125 F.3d 1366 (10th Cir. 1997) ..... 12, 19

*Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248 (1981) ..... 7, 8, 12, 20

*Trujillo v. Univ. of Colorado Health Scis. Ctr.*, 157 F.3d 1211 (10th Cir. 1998) ..... 13, 14, 17

*Watts v. City of Norman*, 270 F.3d 1288 (10th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002) ..... 13

**Statutes:**

42 U.S.C. § 2000e-2 ..... 5

42 U.S.C. §§ 2000e-1 to 2000e-17 ..... 1

## STATEMENT OF THE CASE

Petitioner filed suit against Respondent U S West Corporation ("U S WEST") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17 ("Title VII"), after she was suspended for two weeks for having submitted false information to Pathways, a third-party administrator of U S WEST's tuition reimbursement benefit program. (App. 7a). Although Petitioner never experienced or witnessed any racially discriminatory acts against Caucasian employees in her 22 years at U S WEST, (App. 13a), Petitioner claimed she was the victim of discrimination because an African-American employee was treated more favorably under circumstances she claimed were similar to her own. (Pet. at 3-4).

Petitioner had taken a voice workshop from an individual named George Flynn. (App. 7a-8a). Petitioner sought reimbursement for the workshop from Pathways, identifying the workshop provider as Rocky Mountain Feature Project. (Record 24, Exh. B). Pathways denied Petitioner's request because that entity was not an authorized provider under U S WEST's tuition reimbursement program. (App. 8a). Petitioner resubmitted the form for the same class, but changed the provider to the Arvada Center for the Performing Arts ("Arvada Center"), an authorized provider. (App. 8a). She attached invoices for the workshop marked "Arvada Center for the Arts Statement." (App. 8a). Petitioner was reimbursed for the class. (App. 8a).

Pathways later determined that Petitioner did not take classes from the Arvada Center. (App. 8a). Nor was the invoice attached to Petitioner's reimbursement claim issued by the Arvada Center. (App. 8a). Petitioner claimed that she

mistakenly assumed she was an Arvada Center student. (App. 9a). It was undisputed, however, that Petitioner had never been to the Arvada Center, never completed paperwork from the Center and never paid money to the Center. (Record 24, Exh. A, pp. 114-117).

A Pathways representative notified U S WEST that Petitioner may have submitted false information to obtain tuition reimbursement. (App. 8a). U S WEST initiated an investigation. (App. 8a). The investigator, a Hispanic female, determined Petitioner had acted improperly in obtaining reimbursement. (App. 9a). Petitioner was suspended and required to repay the reimbursed monies ($675.00). (App. 9a). The decision to suspend Petitioner was made by an African-American woman, Edna Haliburton, who supervised Petitioner's direct supervisor, and three Caucasian women. (App. 13a).

The African-American employee to whom Petitioner compared herself had charged personal use of a rental car on a company credit card. (App. 15a). The employee's supervisor, however, had authorized her to fly into Los Angeles for a vacation with her spouse two days prior to training in Northern California and to drive to the training at U S WEST's expense. (App. 15a). After the employee and her spouse made their travel plans, the date of the training session changed. (App. 15a). As a result, only the husband flew into Los Angeles. He rented the car and drove up to meet his wife. (App. 15a). The employee still charged the rental car use to U S WEST. (App. 15a). Because she had prior permission to rent the car at company expense and did not submit any falsified documents, Ms. Haliburton concluded that the employee's actions were not dishonest.

(App. 15a-16a). Ms. Haliburton did issue the employee a written warning for not reconfirming the travel arrangements after the training date changed. (App. 16a).

The United States District Court for the District of Colorado granted summary judgment in favor of U S WEST on the ground that Petitioner failed to state a *prima facie* case of reverse race discrimination under any of the alternatives for establishing a *prima facie* case set out in *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992). (App. 14a, 18a). First, since the majority of Petitioner's co-workers and managers were white, and Petitioner never witnessed any racial discrimination against Caucasian employees in her 22 years as an employee, the District Court found Petitioner could not meet the first prong of the modified *McDonnell Douglas prima facie* case for reverse discrimination: showing "background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." (App. 13a-14a).

The District Court also found that Petitioner failed to establish a *prima facie* case of discrimination under *Notari's* alternative method for proving a *prima facie* case: presenting "indirect evidence sufficient to support a reasonable probability that but for her status the challenged employment decision would have favored the plaintiff." Specifically, the Court found that because different decision makers participated in the employment decisions involving Petitioner and her alleged comparator, the two cases were not similar. (App. 17a-18a). The District Court further found that Petitioner and her alleged comparator were not "similarly situated" in that the comparator had permission to charge the personal expenses. (App. 18a). Under these

circumstances, the District Court held that Petitioner lacked the evidence sufficient to raise an inference of discrimination. (App. 18a). As Petitioner could not state a *prima facie* case under either *Notari* test, U S WEST's motion for summary judgment was granted. (App. 17a-18a). The Tenth Circuit affirmed the Judgment of the District Court. (App. at 4a-5a).

## REASONS FOR DENYING THE PETITION

### I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The thrust of Petitioner's argument for a grant of certiorari is that the Tenth Circuit applied a higher burden upon her (a Caucasian) than it requires of a minority plaintiff to establish a *prima facie* case of discrimination under Title VII. The heightened burden, she argues, is contrary to the spirit of Title VII and the mandates of this Court in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976), that whites and non-whites be protected from discrimination "upon the same standards." (Pet. at 8-9).

Petitioner's argument is without merit. The Tenth Circuit standard by which Petitioner's *prima facie* case was measured is the same fundamental standard that has been cited in every decision of this Court discussing the *prima facie* case in the 30 years since *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), was decided. To review the Tenth Circuit decision below is to question three decades of Supreme Court precedent.

The decision below is unquestionably consistent with *McDonald*. Petitioner was not subject to a heightened burden to establish her *prima facie* case of disparate discipline.

To the contrary, the "traditional" test Petitioner seeks to have applied to her case is identical to the one applied to her by the District Court and the Tenth Circuit below.

### A. The *Prima Facie* Case Requirements Applied To Petitioner In The Decision Below Are Consistent With *McDonnell Douglas*.

#### 1. The *McDonnell Douglas Prima Facie* Case Is Simply A Requirement That The Plaintiff Present Evidence Sufficient To Create An Inference of Discrimination.

Title VII prohibits discrimination in employment based on certain impermissible factors such as race and gender. 42 U.S.C. § 2000e-2. In *McDonnell Douglas*, this Court outlined the now familiar framework for analyzing Title VII claims of disparate treatment. *Id.* at 800. First, a plaintiff has the burden of proving a *prima facie* case of discrimination. *Id.* at 802. A *prima facie* case establishes an inference or presumption of discrimination. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Then, if plaintiff successfully states his or her *prima facie* case, the burden shifts to the defendant employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If the defendant carries its burden, the adverse inference is dispelled and the plaintiff then has an opportunity to prove, by a preponderance of the evidence, that the legitimate reason offered by the defendant was not its true reason, but was a pretext for discrimination. *Id.* at 804.

*McDonnell Douglas* involved an African-American male alleging that he was not hired because of his race. *Id.* at 796.

On these facts, this Court concluded that the Petitioner could establish his *prima facie* case of racial discrimination by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802.

The reason the four factors in the *McDonnell Douglas prima facie* case, if proven, are deemed to create an inference of discrimination is because when the two most common legitimate reasons for rejection are removed (lack of an opening or lack of qualifications), this country's history of racism makes it more likely than not that, absent an explanation, the rejection of a qualified minority candidate is based on discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977); *Furnco Constr. Corp.*, 438 U.S. at 577; *Iadimarco v. Runyon*, 190 F.3d 151, 158 (3d Cir. 1999).

This Court noted, however, that the pattern of proof for establishing a *prima facie* case must be flexible because "the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required . . . is not necessarily applicable in every respect in differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13. This Court has reiterated that principle on many different

occasions. *See, e.g., Furnco Constr. Corp.*, 438 U.S. at 577 ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic."); *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("this standard is not inflexible"); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) ("the *prima facie* case operates as a flexible evidentiary standard").

Although the elements of the *prima facie* case have been articulated in different ways by this Court and courts throughout the country, the various formulations have all been designed to determine whether the plaintiff has evidence supporting an inference of discrimination – a requirement made clear by decades of Supreme Court precedent:

> The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

*Int'l Bhd. of Teamsters*, 431 U.S. at 358; *see also Furnco Constr. Corp.*, 438 U.S. at 576:

> A *McDonnell Douglas prima facie* showing is not the equivalent of a factual finding of discrimination[]. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.

The focus on evidence sufficient to create an inference of discrimination was most recently reaffirmed in *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996). There, this Court eliminated a prong of the Fourth Circuit's *prima facie* case for age discrimination (that the worker be replaced by a person under 40) in favor of a more general showing of "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *Id.* at 312-13. This is exactly what the Tenth Circuit did in *Notari*: bypassing specific criteria for a general showing of evidence sufficient to create an inference of discrimination. 971 F.2d at 590.[1]

*O'Connor* reaffirmed that the hallmark or cornerstone of the *prima facie* case is evidence sufficient to establish an inference of discrimination – so much so that the standard can become the test itself.

---

1. This Court created a similar test in *Burdine*: "plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

### 2. The Tenth Circuit Standard For Establishing A *Prima Facie* Case Of Reverse Discrimination Upholds This Long-Standing *McDonnell Douglas* Requirement.

Though virtually ignored by Petitioner, the Tenth Circuit actually offers two ways, other than by direct evidence, that a plaintiff may establish a *prima facie* case on a reverse discrimination claim: (i) establishing the *McDonnell Douglas* factors with a "background circumstances test" substituted for "racial minority" status or (ii) generally presenting evidence sufficient to establish an inference of discrimination. *See Notari v. Denver Water Dep't*, 971 F.2d 585, 589-90 (10th Cir. 1992).[2] Both of these standards were applied to Petitioner. She failed both tests. (App. 14a, 18a).

In *Notari*, a promotion was given to a woman over a man who was rated higher than the woman by their supervisors. *Id.* at 586-87. He filed a claim for sex discrimination. *Id.* at 587. The District Court dismissed his claim for failure to state a *prima facie* case of discrimination on the ground that he failed to show background circumstances that would support an inference that the respondent was "one of those unusual employers that discriminates against the majority." *Id.* at 588. The Tenth Circuit reversed and remanded the case to the District Court to apply an alternate test. *Id.* at 590.

---

2. The general evidence cannot, however, be comprised solely of the four facts set out in the *McDonnell Douglas prima facie* case. *Id.* at 590.

The starting point for the Tenth Circuit was the *McDonnell Douglas* four-pronged *prima facie* case. *Id.* at 588. It then determined that

> [i]t is appropriate to adjust the prima facie case to reflect" the reverse discrimination context of a lawsuit because the presumptions in a Title VII analysis that are valid when a plaintiff belongs to a disfavored group are not necessarily justified when the plaintiff is a member of a historically favored group.

*Id.* at 589.[3] As a result, the Tenth Circuit held that in lieu of showing membership in a traditionally disfavored group (the first prong of the *McDonnell Douglas* test), a plaintiff in a reverse discrimination case has to meet the "background circumstances" test employed by the District Court. *Id.* at 588-89. Only then is the presumption of race discrimination and the burden-shift to the employer justified.

Because of a concern that discrimination could occur even where "background circumstances" were absent, however, the Tenth Circuit determined that an alternative for establishing a *prima facie* case should be available in the reverse discrimination context:

> A given employer may discriminate against an individual white worker even when no evidence demonstrates that the employer generally favors workers who belong to historically disadvantaged groups.

---

3. In other words, absent a history of discrimination, the fact a majority plaintiff was qualified for a job (not more qualified) and did not obtain it does not justify the presumption that it is more likely than not that the true reason for the rejection was racial bias.

*Id.* at 590. Therefore, the Tenth Circuit decided that rather than trying to fit the reverse discrimination case into the *McDonnell Douglas prima facie* formulae, "a plaintiff who presents . . . indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff states a prima facie case of intentional discrimination under Title VII." *Id.* at 590. Under this test, "the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Id.* (emphasis added).[4]

This standard is essentially the same as the standard repeated again and again by this Court for establishing a *prima facie* case: "*showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion . . .*'" *Furnco Constr. Corp.*, 438 U.S. at 576 (emphasis added); *O'Connor*, 517 U.S. at 312. The fact that the pattern of proof required may be ever so slightly different, as it is every time the factual circumstances change, is not significant. To take issue with the Tenth Circuit standard here is to question years of Supreme Court precedent on this issue.

---

4. The Third Circuit has established a very similar test:

> all that should be required to establish a *prima facie* case in the context of "reverse discrimination" is for the plaintiff to present sufficient evidence to allow a fact finder to conclude that the employer is treating some people less favorably than others based upon a trait that is protected under Title VII.

*Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999).

Contrary to Petitioner's argument, this standard does not focus on discrimination against a group rather than an individual. (Pet. at 10). As recognized by the District Court, this concern was addressed by the Tenth Circuit's adoption of the alternative standard. (App. 14a n.3). Nor does the Tenth Circuit test require evidence only presented at the pretext stage. (Pet. at 11). To the contrary, the Supreme Court has already approved the use of this same standard as part of the *prima facie* case under Title VII in multiple cases. *See O'Connor*, 517 U.S. at 312-13; *Burdine*, 450 U.S. at 253. The evidence required by the standard is not onerous. *See, e.g., Taken v. Oklahoma Corp. Comm'n*, 934 F. Supp. 1294, 1298 (W.D. Okla. 1996), *aff'd*, 125 F.3d 1366 (10th Cir. 1997) (racial make-up of department or managers and relevant discriminatory statements could be evidence sufficient to meet the standard); *Archuletta v. Colorado Dep't of Prob.*, 46 F. Supp. 2d 1100, 1005 (D. Colo. 1998) (evidence of dissimilar treatment could be sufficient). The Tenth Circuit standard is fully compliant with *McDonnell Douglas*.

### B. There Is No Difference Within The Tenth Circuit Between The *Prima Facie* Case Requirements Applied To Petitioner Below And The Prima Facie Requirements For A Minority Plaintiff To Establish The Same Case Of Disparate Discipline.

Not only is the Tenth Circuit standard about which Petitioner complains fully compliant with *McDonnell Douglas*, but it is also compliant with *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). There is no difference between the standard applied to Petitioner below and the Tenth Circuit standard for stating a "traditional" claim of disparate discipline that Petitioner now seeks to have applied to her case. Petitioner's complaint regarding a "heightened standard" is a fallacy.

Petitioner's race discrimination claim is one of disparate discipline – that she was treated more severely for her poor conduct than another person of a different race. (Pet. at 2-3). The *prima facie* case Petitioner seeks to have applied to her is set forth in *Trujillo v. Univ. of Colorado Health Scis. Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). There, a Hispanic male alleged he was discharged for certain conduct when non-Hispanic employees were not. *Id.* at 1213. The Court applied the following test to determine whether he could establish a prima facie case of discrimination: (1) he was a member of a protected group; (2) he suffered an adverse employment action; and (3) his employer treated similarly situated employees differently.[5]

Although Petitioner did not cite to it, another panel of the Tenth Circuit more recently stated the test differently:

> A plaintiff in a discriminatory suspension case . . . makes out a prima facie case upon showing: (1) that plaintiff belongs to a protected class; (2) that he suffered an adverse employment action; and (3) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination.

*Hysten v. Burlington N. and Santa Fe Ry. Co.*, 296 F.3d 1177, 1181 (10th Cir. 2002). The Court, which disagreed with the District Court's application of the *Trujillo* standard because it "may have overstated plaintiff's prima facie burden,"

5. "A plaintiff wishing to prove discriminatory animus with evidence that his employer treated him differently from other employees bears the burden of showing that the comparison is legally relevant – i.e., that the employees were similarly situated." *Watts v. City of Norman*, 270 F.3d 1288, 1293 (10th Cir. 2001), *cert. denied*, 535 U.S. 1055 (2002).

remarked that "[o]ur disagreement with the district court is largely one over semantics because ordinarily the third part of this test will be satisfied by proof that the employer treated similarly situated employees more favorably." *Id.*

There is simply no difference between either of these standards and the standard applied to Petitioner: to produce evidence "sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." *Notari*, 971 F.2d at 590. Each have the simple requirement that a plaintiff present some form of evidence that raises an inference of discrimination (that, but for her status, the discriminatory action would not have occurred). Petitioner simply was not subjected to a different standard.

Because the standards are identical, Petitioner's real complaint is that she does not like how the lower courts applied the one, consistent standard to the facts of her case. Petitioner's brief makes that point clear. Since Petitioner does not and cannot distinguish between the *Notari* alternative test and the *Trujillo* test, she argues that the lower courts erroneously applied *both* of these standards to the facts of her case:

> Th[e] reasoning [of *McDonald*] is entirely undermined by requiring plaintiffs who are not in a minority group are subjected [sic] to a higher burden in order to establish a prima facie case for discrimination. Here, indirect evidence supports a reasonable probability that [Petitioner] would not have been disciplined if her race was African-American rather than Caucasian. Such evidence is sufficient to establish a *prima facie* case of

> discrimination. *Notari v. Denver Water Dep't.*, 971 F.2d at 590.

(Pet. at 9). Later, Petitioner argued:

> Here, Plaintiff established a prima facie claim of discrimination by establishing that: (1) she was a member of a protected group; she suffered an adverse employment action, and (2) she was treated differently and less favorably than a similarly situated African-American employee. *See Trujillo v. University of Colorado Health Sciences Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998).

(Pet. at 12).

Petitioner's ambivalence about which test to use is a recognition that there is no practical difference between the majority and minority plaintiff tests in the Tenth Circuit. Therefore, the issue raised by Petitioner is not actually presented by this case. Not only does this mean that Petitioner lacks a basis for her complaint about a heightened standard, but it also means that this case does not present a meaningful opportunity for this Court to compare two different standards of proof. A grant of certiorari is not warranted here.

## II. THE QUESTION PRESENTED HAS NO BEARING ON THE OUTCOME OF THIS CASE.

This is not a case, as Petitioner would have the Court believe, of a Caucasian plaintiff deprived of an opportunity to get to a jury on facts raising an inference of discrimination simply because she is Caucasian. Petitioner was unsuccessful

in the courts below not because she was subjected to some different standard, but because she did not have one shred of evidence that she was subjected to any discrimination. Even if the standard for a *prima facie* case applied to Petitioner below was materially different from the standard applied to a minority plaintiff on the same claim (which it was not, *see* Section I(B)), the Court would not even need to reach the question presented by Petitioner. By virtue of the absence of any evidence of discrimination, Petitioner cannot satisfy any *prima facie* test.

The District Court made two determinations that were upheld on appeal to the Tenth Circuit. First, the District Court held that because Petitioner was employed in a department that had a Caucasian majority of workers and managers, and because she never heard any racial remarks from management or witnessed any racial discrimination in her 22 years at U S WEST, Petitioner did not present any background circumstances to support an inference that U S WEST was one of those unusual employers who discriminates against the majority. (App. 13a).

Second, because the Petitioner could not dispute that the employment and disciplinary decisions made about her case and that of the African-American woman to whom she compared herself were made by different sets of people, Petitioner could not establish that she was similarly situated to the co-worker in question. (App. 17a). That comparison, therefore, was legally irrelevant.[6] Because she did not have any evidence that a similarly situated person was treated dissimilarly, the District Court found that Petitioner also

---

6. *See supra* note 5.

failed *Notari*'s alternative test: that she present "evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred." (App. 18a).

However, because she does not have any evidence that a similarly situated person was treated dissimilarly, or any other evidence of discrimination, Petitioner would also fail the test she seeks to have applied to her from *Trujillo*. As a result, her total lack of evidence of discrimination and inability to meet either test would allow this Court to resolve this case without even addressing the issue of the applicable standard. Therefore, the question presented has no bearing on the outcome of this case and the petition for certiorari should be denied.

## III. THERE IS NO CIRCUIT SPLIT REGARDING THE BURDEN OF PROOF REQUIRED TO ESTABLISH A PRIMA FACIE CASE OF REVERSE DISCRIMINATION AND THE SPLIT REGARDING THE PRECISE PATTERN OF PROOF REQUIRED IS NOT A COMPELLING REASON TO GRANT CERTIORARI HERE.

Petitioner cites to a split between the circuits regarding "the burden a victim of reverse discrimination has in establishing a prima facie claim of discrimination" as a reason for granting certiorari. (Pet. at 4). Actually, the circuits are not split regarding the plaintiff's *burden* of proof. The circuit courts have been clear that plaintiff's burden to establish a prima facie case of discrimination, reverse or otherwise, is to offer evidence sufficient to support an inference of

discrimination. *Compare Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1104 (11th Cir. 2001) (cited by Petitioner as a Circuit decision which does not distinguish between race and reverse race discrimination claims) *with Harding v. Gray*, 9 F.3d 150, 152-53 (D.C. Cir. 1993) (the leading Circuit case utilizing a "background circumstances" test in a reverse discrimination claim). Both cases, despite their different *patterns* of proof, recognize that the *McDonnell Douglas prima facie* case requires indirect evidence sufficient to create an inference of discrimination. *Bass*, 256 F.3d at 1104; *Harding*, 9 F.3d at 152-53. This is true for the other circuits as well. *See, e.g., Notari*, 971 F.2d at 589; *Iadimarco*, 190 F.3d at 160.

The split referenced by Petitioner actually relates to the more technical issue of the precise *pattern* of proof required to meet this initial burden in a reverse discrimination case, an issue this Court noted was not key to the *McDonnell Douglas* analysis. *See Int'l Bhd. of Teamsters*, 431 U.S. at 358. The pattern of proof in the Eleventh Circuit is a slightly modified *McDonnell Douglas prima facie* case: plaintiff must show (1) he was qualified and applied for the position; (2) he was rejected; and (3) that other equally or less qualified employees who are not white were hired. *See Bass*, 256 F.3d at 1104. The D.C. Circuit offers a different modification. Because "[i]nvidious racial discrimination against whites is relatively uncommon in our society, and so there is nothing inherently suspicious in an employer's decision to promote a qualified minority applicant instead of a qualified white applicant," the D.C. Circuit requires a reverse discrimination plaintiff, in lieu of showing membership in a racial minority, to show "background circumstances that support an inference that the defendant is one of those unusual employers who

discriminates against the majority." *Harding*, 9 F.3d at 153.[7] The Tenth and Third Circuits state the test more generally: any evidence sufficient to support a reasonable inference of discrimination. *See Notari*, 971 F.2d at 590; *Iadimarco*, 190 F.3d at 161.[8]

While there is a difference between the circuit courts on the precise pattern of proof required, as a practical matter, the difference is minor and does not present a compelling reason to grant certiorari. For example, while it is true that a reverse discrimination plaintiff cannot, under *Notari*, rely on just the facts that he or she was qualified, was rejected and that the position was offered to someone else or left open (the *McDonnell Douglas* factors applied by the Eleventh Circuit), *see Notari*, 971 F.2d at 590, he or she can cite to similar, easily attainable pieces of evidence that would establish an inference of discrimination. *See, e.g., Taken*, 934 F. Supp. at 1298 (racial make-up of department or managers and discriminatory statements); *Archuletta*, 46 F. Supp. 2d at 1005 (dissimilar treatment).

Likewise, a closer review of the "background circumstances" test demonstrates that it, too, is not very different from the Eleventh Circuit test or the Tenth Circuit (*Notari*) test. The D.C. Circuit has clarified that background

7. This is the same test as the first alternative available to a plaintiff under *Notari*, 971 F.2d at 590.

8. Despite Petitioner's assertion that the Seventh Circuit test is a "background circumstances" test, it actually offers two alternatives for establishing a *prima facie* case of reverse discrimination: "background circumstances" or evidence "establish[ing] a logical reason to believe that the [employer's] decision rests on a legally forbidden ground." *Mills v. Health Care Servs. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999). In this way, it is more comparable to *Notari* and *Iadimarco*.

circumstances can include "evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." *Harding*, 9 F.3d at 153. This proof requirement is similar to the standard set forth in *O'Connor*, 517 U.S. at 312-13, *Burdine*, 450 U.S. at 253 and *Notari*, 971 F.2d at 590. Allegations of background circumstances, therefore, have included simple allegations such as plaintiff's superior qualifications, departures from typical hiring procedures and giving little consideration to the plaintiff. *Harding*, 9 F.3d at 153.

This difference between the circuits in the proof required to establish an inference of discrimination is not dramatic. The proof required is not harder to discover or obtain. It is simply different, a difference justified by the different factual circumstances of having a majority plaintiff. Both the *Notari* alternative test and the "background circumstances" test, though differently stated, simply recognize that some additional proof, beyond the fact the person was qualified and rejected in favor of another person outside his group, is necessary to justify an inference of discrimination where a history of racism is absent. Otherwise, the presumption of discrimination that the *McDonnell Douglas* burden-shifting framework relies upon is unwarranted. *See Notari*, 971 F.2d at 590; *Harding*, 9 F.3d at 153-54.

The split between the circuits here is minor and tolerable. Even if this Court wanted to address it, this case does not present a meaningful opportunity to do so. The standards within the Tenth Circuit for a traditional claim of disparate discipline and a reverse discrimination claim of disparate discipline are equivalent – there is no meaningful contrast between the two standards. Second, even if the standards were different, Petitioner's case would fail to meet either on its facts. This Court would never even reach the issue presented.

## CONCLUSION

For these reasons, the Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

J. MARK BAIRD
*Counsel of Record*
BETH A. DOHERTY QUINN
BAIRD LAW FIRM, LLC
2036 E. 17th Avenue
Denver, CO 80206
(303) 813-4500

ROBERT L. JOGA
SENIOR ATTORNEY
LABOR AND EMPLOYMENT
LITIGATION
QWEST CORPORATION
1801 California Street
38th Floor
Denver, CO 80202

*Attorneys for Respondent*